

Freedom of Information

Review

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Comment

I have just finished reading *Dark Victory* by David Marr and Marian Wilkinson, published by Allen & Unwin, which examines the Tampa rescue, Children Overboard Affair and SIEV X in the context of the 2001 election campaign. This book is a strong testimony to Matthew Ricketson's plea in 'Freedom of information and authors: an unsung treasure trove', in (2001) 94 *FoI Review* for a greater use of FoI by journalists producing books. The authors have made extensive use of material collected under the Commonwealth *Freedom of Information Act*. Wilkinson reported in the *Sydney Morning Herald* (28 October 2002) that their use of FoI had, however, been a drawn out and fairly costly exercise. *Dark Victory* is a disturbing book in terms of how information management and governance at a federal level in Australia is more than ever hooked into the political needs of the governing party.

The themes and episodes outlined in *Dark Victory* resonate with the ideas and arguments presented in two other books I have recently read. These books are Nicholas Jones, *The Control Freaks: How New Labour Gets Its Own Way*, Politics, 2002 and George Pitcher, *The Death of Spin*, Wiley and Sons, 2003. Nicholas Jones argues at page 7 that 'Downing Street has exercised unprecedented authority over the flow of information to the news media from across Whitehall; this level of control, combined with a deep-seated urge within New Labour to control and manipulate what is said on the party's behalf, raises important ethical and constitutional questions, which need to be addressed'. Pitcher takes spin-culture and looks at it in a context beyond politics and argues that it has infected the way we do business and how the media and our institutions operate. Pitcher sees spin-culture as a 'triumph of presentation over content, that values how we are perceived rather than how we behave or what we believe' (inside fly leaf).

The paradox of the last decade in countries like Great Britain, Canada and Australia is the extent to which FoI (or codes of access in Great Britain) have failed to offset the concentration and cynical manipulation of public information. How have the ethics and values of the public service been consumed and reforged to create such zealous followers of spin-culture? The stage management of public information, depicted in *Dark Victory*, during the Australian 2001 federal election campaign, would impress even Tony Blair's spin masters. The challenge, for supporters and users of FoI, is to demonstrate how presentation and perception can be reigned in to support values and content in public life and discourse.

Changes in news management, production and techniques have compounded the difficulties faced by those in the media in dealing with a more sophisticated, co-ordinated and attentive government media team. In the terms depicted by Terrill in his article 'Individualism and freedom of information legislation' (2000) *FoI Review* 87, governments have extended their structural advantage over an increasingly under-resourced, under pressure and inexperienced media. The pursuit of a story that is independent of the favoured government line is harder in terms of finding alternative voices and reliable information, free from spin and control, from within the government's ranks be it parliamentary or bureaucratic. Yet the clear portrayal, and the careful outlining, of the extent and nature of this manipulation as in *Dark Victory* or *The Control Freaks* offers some support for Pitcher's claims about *The Death of Spin*. Pitcher argues that the Internet is forcing global communications and world business to 'concentrate on dialectical engagement, rather than assertion, image-presentation and obfuscation'. There exists an urgent need to rebuild trust and confidence in institutions, the professions and between key elements of our civic culture.

Rick Snell

Ontario's freedom of information access process: 'a view from the inside'¹

Introduction

In an excellent discussion of the administrative tribunal and its internal procedures, Paul Weiler emphasised the need 'to understand the administrative phenomenon from the inside, to empathize with its objectives and its dynamic, and only from within that frame to define the necessary limits and controls'.² Although Weiler was concerned with administrative processes in a labour relations context, his comments are equally applicable to the administration of freedom of information (Fol) legislation. This article will explain why a 'view from the inside' is necessary to appreciate fully the access process that underpins Fol legislation in Ontario.³

Examining the Fol access process from the 'inside' is valuable for at least two reasons. First, it simply has not been done. Serious commentary on Fol issues has been scant and what little there is has often focused on substantive issues rather than on procedural concerns.⁴ This is especially the case with contributions from knowledgeable insiders. Commentary from those situated outside the access process has touched periodically on procedural matters but tends to suffer from lack of familiarity with the internal workings of the access process.⁵ The result is a partial critique which does not do justice to the workings of the access process as a whole.

Second, an insider's view of the access process could be of value to those outside the process especially if, as Weiler suggested, it helps them 'empathize with its objectives and its dynamics'. Certainly it could assist requesters in using the process to their best advantage by encouraging them to frame their requests more effectively, to avoid or minimise issues that could delay responses, or to think about whether or not the Fol process provides the most effective vehicle for obtaining the information in question.⁶ There is also good reason to think that an insider's perspective on the access process could be enlightening for other interested or involved parties whether they be individuals within the organisation, affected third parties, outside critics or commentators, or even the Information and Privacy Commissioner.

What follows is a modest attempt to explain the Fol access process from the vantage point of an insider. This will include the perspective that an administrator⁷ brings to the access process, the administrator's reference points, statutory and otherwise, which provide direction and guidance in terms of managing the access process, and the procedural issues that arise throughout. Process issues will be considered in the context of four questions which are of particular concern to many requesters. These are: (1) how is the process initiated? (2) how long does it take? (3) what costs may be entailed? and (4) what type of response must be provided? The discussion will not delve into the details of the access decision-making process, nor will it extend to the appeals process, except to the extent that either has procedural significance. This should focus attention on the primary

concern of the article, which is the access process rather than substantive outcomes.

Competing expectations: the administrator's challenge

Making the Fol access process work effectively is a demanding proposition at the best of times. Various parties with divergent interests bring competing expectations to the access process. Many of the expectations are legitimate but others are not,⁸ some are realistic, others less so. The way in which the administrator can respond will be affected largely by the following considerations.

First, Ontario's Fol legislation sets out the access process in considerable detail unlike, for example, the privacy complaint process or other administrative processes in general. Not only does the legislation provide requesters and affected third parties with very specific sets of rights, but it also imposes a number of positive obligations on institutions responding to requests.⁹ This means that some parties come to the access process with very clear expectations concerning their entitlements.

Second, the access process is characterised by clearly established time frames that are also statutorily imposed. Timeliness becomes a fundamental aspect of the access process,¹⁰ a point that is again in sharp contrast to the appeals process, the privacy complaint process, or many other administrative processes.

Third, virtually any procedural decision, or the failure to decide in a timely fashion, is appealable to the Information and Privacy Commissioner. While this certainly injects transparency and accountability into the process, it also carries resource and policy implications for administrators who must consider seriously the risk of going to appeal on particular issues.¹¹

Fourth, administrators must often function within organisational settings that are not uniformly receptive to the public's right of access to information. This can be manifested in a number of ways including grudging co-operation, benign neglect, or outright hostility.¹² Any of these reactions, if ingrained in the organisational culture, will seriously undermine effective administration of the access process.

Finally, inadequate resources is a perennial problem even where there is general institutional support for the legislation.¹³ Not only do administrators frequently lack the staff needed to manage the access process, but program areas may be understaffed as well. Not surprisingly, responding to access requests will seldom take priority over more immediate program delivery concerns. A lack of dedicated resources also means that there is seldom a cushion to absorb the demands imposed by the influx of large numbers of requests or particularly complex requests.¹⁴ In short, resource issues can have a significant impact on procedural outcomes.

All of these considerations combine to shape the administrator's environment. Also at work is an ongoing interplay between the need for sound, timely decision making in the short term and concern for the overall effectiveness of the access process in the long term. For example, given that any procedural decision is appealable, the administrator must factor this into the decision-making process. Appeals consume valuable resources, they may result in adverse precedents that constrain future action, and they can jeopardise goodwill and even credibility if particular positions are pursued with excessive vigour. However, to acquiesce to requesters simply to avoid the possibility of an appeal is no answer either; it may only inflate unrealistic expectations.

While the administrator strives to make the process work effectively both in the short term and on an ongoing basis, this is seldom a concern of many other participants in the process. The focus of some is narrow and short-term in nature with the primary goal being to make the process work to their best advantage.¹⁵ Others may not be particularly interested in seeing the process work effectively. Frequently, the interests of these parties conflict sharply and it becomes incumbent on the administrator to manage the divergent demands and pressures that result. The key players whose concerns must be addressed are requesters, third parties affected by access requests, the administrator's own organisation, other government bodies that may have an overlapping interest in requested records, and the Information and Privacy Commissioner's office. A few words about each is needed to appreciate the challenges the administrator faces.

Requesters comprise the largest and most diverse group in the system. As initiators of the access process, they often arrive with the clearest set of expectations, even if these are at times unrealistic. Some requesters come to utilise the process on an ongoing basis and, aside from those in the truly frivolous or vexatious category, become the easiest group to work with from the administrator's perspective. Experience allows them to operate more effectively and their ongoing attachment to the process makes them appreciate and accommodate the trade-offs needed to make the system function properly. One-time users, on the other hand, may be more inclined to try to maximise their returns, thereby insisting vigorously on their rights at all stages of the process. However, the experienced administrator can frequently discourage requesters from pursuing this tack by persuading them that this may not be a useful way to advance their interests

The truly difficult requester, however, is another matter entirely. Difficult requesters come in various forms. Some simply refuse to co-operate and insist on their rights at every step of the process. Others cannot be persuaded that the records they want do not exist and pursue the issue relentlessly. Then, of course, there are those who intentionally set out to abuse the process. Their numbers are small but their impact is great; if unchecked, they can paralyze the system.¹⁶

Third parties whose interests may be affected by access requests pose very different problems for

administrators. As a starting point, the third party notification process can be both time consuming and resource intensive and careful decisions need to be made about when notification is required.¹⁷ Clearly, the statutory entitlement to notification must be respected, but notifying all outside parties out of an abundance of caution is not a viable strategy. This can easily tie up the process in appeals that lack foundation, use up precious resources, and compromise the rights of requesters.

However, when notification is clearly required, third parties present special challenges. Unlike requesters whose expectations must sometimes be dampened, third parties are often reluctant participants in the access process. Frequently they know little about FoI legislation, they do not fully understand how their interests may be affected, and they are either unwilling, unable, or feel it unnecessary to participate in a manner that will advance their interests. By necessity, the administrator's role is to educate third parties and assist them so that they can participate effectively. When this is achieved, the entire process benefits. However, the administrator must be prepared to expend the necessary resources to make the notification process work; without this commitment, the process will not function properly, third parties will feel short-changed, and requesters will be frustrated.

The most difficult party the administrator must deal with is frequently the administrator's own institution. Without its co-operation in responding to requests, the administrator's task is daunting if not impossible, a fact that has been readily acknowledged by access commissioners.¹⁸ When there is outright hostility to the principle of access throughout an institution, the access process certainly cannot function. However, an administrator requires much more than grudging, half-hearted support from program areas and senior staff. For the process to work effectively, an administrator must be able to count on program areas to conduct searches for requested records in a thorough and timely manner, to provide reliable estimates of time and effort required to conduct searches, and to provide additional information that may assist in clarifying requests or determining whether or not notification entitlements may be triggered.¹⁹

Cultivating program area support is no small undertaking. The administrator must appreciate that from the program area's perspective, access requests can involve considerable work and produce few tangible benefits. If anything, there is perhaps a greater risk that information that may be released will prove embarrassing to the institution and to the program area. And frequently requests are made for purposes that may appear vexatious, particularly if they come from individuals who have a history with the institution.

In order to overcome institutional resistance, the administrator needs to foster a culture of compliance. Clearly, senior level support is necessary to accomplish this, but generating co-operation on a day-to-day basis at the program level requires much more. It is certainly important to explain the legislation's purposes and to emphasise that compliance with access requests is statutorily mandated, but that is not enough. Program areas have to be convinced that responding effectively at the

request stage is far less onerous than having to deal with the same issues at the appeal stage when compliance costs may become a significant factor. Where there is IPC precedent to demonstrate this, it can be employed usefully by the administrator to convey the message.²⁰ The administrator must also encourage program areas to avoid making non-compliance itself an issue, a tactic that can pay greater dividends when there are other program areas with strong records of compliance. Indeed, a high level of compliance within the institution as a whole provides extremely useful leverage with individual program areas.

However, no matter how successful the administrator may be in developing a culture of compliance, maintaining it is an ongoing task. There will always be some slippage as a result of staff turnover; access requests will continue to be inconvenient for various parts of the organisation and will still invite resistance; and resources are likely to remain a precious commodity provided reluctantly by program areas. These will remain permanent challenges, even if compliance has become part of the institutional culture.

The administrator will also find it necessary to deal with other government institutions throughout the access process. Frequently, a request made to one institution may involve records held by other institutions. If the institution receiving the request actually has none of the requested records, it is a simple matter of transferring the request to the institution that does hold the records.²¹ More often, the same records may be held by several institutions. Then it becomes a matter of deciding who is to deal with the overlapping records. In some cases it is easy enough to decide who has the 'greater interest'²² in the records, which will largely dictate who will respond.

However, matters become more complicated when an institution having a significant interest in the records prefers not to handle the request but wants input into the access decision. If the disclosure practices of both institutions are relatively similar, the problems will be minimal. But this is not always the case and issues may arise if the institution making the access decision is inclined to release the records while the institution seeking input wants the records withheld. This is a factor the access administrator must be aware of from the outset when procedural matters such as transfers are being addressed.

Divergent institutional practices can also become an issue when a requester makes basically the same request to two institutions. If the requests involve large numbers of records, fees will come into play. If each institution responds in a similar manner, there may be no concern. However, if one institution issues a large fee estimate while the other is prepared to waive all fees, there may well be problems. That being said, there is no panacea that would ensure uniform responses, even on procedural issues, without imposing a degree of centralised oversight of the access process that few would welcome. However, the access administrator does need to be cognisant of the problems presented by dramatic institutional variances and should always be prepared to justify fully his or her institution's practices.

The final key player in the access process is the Information and Privacy Commissioner's office. John Grace, a former federal Access to Information Commissioner, once characterised his office as a 'staunch ally'²³ of access administrators and while there is merit to this, the issue is somewhat more complicated. Without question, the Information and Privacy Commissioner can assist the administrator in a number of ways. First, the Commissioner's orders may provide the administrator with valuable internal leverage. Not only may particular administrative practices or approaches be ruled impermissible but the IPC's orders may contain significant compliance requirements, which can be used to good advantage by the administrator. Second, the Commissioner can and has supported administrators by explicitly acknowledging the critical role they play within their institutions.²⁴ Third, the Commissioner can provide direction and assistance to administrators by developing guidelines and other educational materials that inform administrators and assist them in their dealings with requesters and program areas. Finally, when dealing with requesters on process appeals, the Commissioner's office can enhance an administrator's credibility when it confirms that his or her decision was in conformity with the legislation.

For all of these reasons, it makes good sense for the administrator to work as co-operatively as possible with the Commissioner's office. However, there are likely to be points of difference that cannot be resolved short of adjudication. Here the Commissioner's office will always have the final say, subject to judicial review.²⁵ As a result, the relationship between the administrator and the Commissioner's office can be an uneasy one; no matter how positive the relationship, it is never equal and is always potentially adversarial.

These, in very general terms, are the critical factors and considerations that shape the FOI access process from the administrator's perspective. The focus now shifts to the specific sources of authority that direct, guide and assist the administrator in managing the access process.

Procedural reference points for the administrator

The administrator has no shortage of reference points that direct and inform procedural decision making. They fall into three basic categories: legislative provisions, legal precedents, and directives, guidelines and policies.

The legislation is the obvious starting point for the administrator. What is striking about both the provincial and the municipal FOI statutes is the degree of detail that is to be found in the legal standards governing the access process. Whereas the legislation contains absolutely no reference to a privacy complaint process, the access process is described from start to finish in precise terms.²⁶ Moreover, the legislation makes very clear that institutions have a positive obligation to assist requesters throughout the process. By itself the legislation would provide considerable direction to any administrator. However, further assistance is contained in the regulations, which address procedural issues such as fees and fee waivers in more detail.

Apart from the specific legal standards that govern the access process, there are other legislative provisions that concern the administrator. Of particular note are the powers the Commissioner can exercise at the appeal stage. These include the authority to issue binding orders which may contain any terms and conditions the Commissioner considers appropriate, the right to enter the institution's premises and conduct searches that are relevant to the appeal, and the power to compel testimony.

From a procedural perspective, the Commissioner's powers are vitally important. Since the Commissioner can issue binding orders, the potential for delay is reduced dramatically. If an institution fails to make a decision required under the legislation, it can be compelled to do so within a specific time frame. And given that judicial review is seldom undertaken on procedural issues, this essentially concludes the matter.

The Commissioner's authority to include terms and conditions that may be appropriate in an order is also significant because it can be used to preclude the institution from relying on certain statutory provisions. For example, the Commissioner can order an institution to provide records at no cost to the requester even though fees would otherwise clearly apply.²⁷

Finally, the Commissioner's powers to conduct searches on the institution's premises²⁸ and to compel testimony²⁹ provide the administrator with valuable leverage in ensuring that thorough searches for records are conducted.³⁰

From legislative standards and provisions, the administrator's focus turns to legal precedents. Given that judicial review has been confined largely to substantive matters, the administrator will find little direction from the courts on procedural issues. Therefore, the Commissioner's decisions become the administrator's primary reference point on procedural matters. On some procedural issues, the Commissioner's jurisprudence is remarkably thin, while on other points it can be dense. However, a difficulty with many of the decisions is that they are so dependent on the particular facts that one must be cautious about how much reliance can be placed on them. Another shortcoming, which applies to substantive matters as well, is that too few of the Commissioner's decisions discuss policy considerations in any great detail,³¹ which is unfortunate because this type of content is of great use to administrators seeking guidance.

Aside from the Commissioner's decisions, recourse can also be had to other jurisdictions where access commissioners are vested with order-making powers. If the legislation is reasonably similar to Ontario's and if the orders delve into policy considerations, they could be instructive.

Finally, the administrator will want to consider any guidelines or policy statements that address procedural matters. The most valuable source will be the Commissioner's office given its authority to make binding orders; any guideline or practice direction that is issued will be instructive since it may provide some preliminary sense of how the Commissioner will view a procedural matter.³² Thus far the Commissioner has addressed such matters

as clarification of requests, protecting the identity of requesters, notifying third parties, and issuing decision letters.³³

The Management Board of Cabinet has also produced a number of documents that may provide guidance to administrators on procedural matters. These include a guideline on the Fol process, a manual which explains how the legislation works, and an annotation of the provincial and municipal statutes.

Without question, administration of the access process is facilitated greatly by relatively clear and detailed legislative standards, significant grants of legal authority to the Commissioner, accumulated legal precedent, and a variety of guidelines and practice directions. What is left to consider is how the access process actually works.

Initiating the access process

One who is new to the Fol process will have a number of basic questions about how the process begins. They can probably be best summed up in the following way: (1) who can make an access request? (2) must one explain why the request is being made? (3) what can be requested? and (4) how is the request made?

In principle, anyone is able to make a request for information, there being no qualification such as the citizenship requirement at the federal level.³⁴ A requester can also act through an agent or representative, although the individual's consent would be required if the request involved the individual's own personal information. A requester is even entitled to have his or her identity protected although, as a practical matter, this is only feasible with respect to requests for general records, not for requests involving an individual's personal information. On this point, the Commissioner's office has stated clearly that a requester's identity should never be disclosed outside the access administrator's office except to the extent that it is necessary to respond to the request.³⁵ Several comments are in order.

There are very sound reasons for trying to protect the identity of a requester. Quite simply, requests are more likely to receive consistent treatment from program areas when the source of the request is unknown. Administrators are very much aware that there is a real danger that program areas will allow concerns about the source of a request to affect the way in which the request is processed. Second, as the Commissioner points out, requesters should be able to exercise their rights under the legislation without the fear of 'negative repercussions'.³⁶ That being said, there is no statutory basis for the blanket claim that requesters' identities should never be disclosed except to the extent necessary to process the request. The legislation simply does not speak to this point. The most that can be asserted is that the identity of a requester acting in an individual capacity can be protected on the basis that it is personal information.³⁷ This is certainly a legitimate position, but a far narrower one than that advanced by the Commissioner. In addition, as a practical matter it would be administratively onerous to restrict the disclosure of requesters' identities to the extent advocated by the Commissioner, particularly in institutions with high volumes of requests. It probably

makes far better sense to focus on those cases in which the requester's identity is a sensitive issue and ensure in these instances that the appropriate precautions are taken.

Although normally a requester's identity should not be an issue, there are several exceptions to this. The requester's identity can become a relevant factor at later stages of the process with respect to issues such as third party notifications, fee waivers, or application of the public interest override. Third party submissions concerning possible disclosure of records are frequently affected by who is asking for the records,³⁸ fee waiver decisions may involve the requester's personal circumstances,³⁹ and the triggering of the public interest override will depend on the type of interest being advanced.⁴⁰ In all of these situations, it will usually be to the requester's advantage to make his or her identity clearly known.

The requester's identity is also of particular concern with respect to the frivolous or vexatious requester. When an individual engages in a pattern of conduct that constitutes an abuse of the access process, both the identity of the requester and the purpose of the request become foremost considerations. Neither the provincial or municipal statutes initially addressed the frivolous or vexatious requester issue. However, the legislation was changed in 1996 largely as the result of the serious problems created by several individuals who tied up the system with massive numbers of requests and appeals.⁴¹ Amendments that were introduced allowed institutions to deny access to requests that were viewed as frivolous or vexatious and also precluded such requesters from relying on the continuous access provisions.⁴²

The problem of the frivolous or vexatious requester has been largely eliminated but not because of the frivolous and vexatious provisions. What appears to have addressed the problem is the introduction of mandatory application fees and appeal fees.⁴³ The fee changes were probably successful for two reasons. First, they struck at the root of the problem which was the ability of small numbers of individuals to inundate the system with huge volumes of requests which could then be converted into a myriad of appeals involving both procedural and substantive points. Second, they avoided two inherent difficulties with the frivolous or vexatious provisions. Because an abusive pattern of conduct had to be demonstrated in order to trigger the section and decisions denying access were themselves appealable, this meant that there was still an opportunity to abuse the process. However, these opportunities were effectively foreclosed unless the individual was prepared to pay the application and appeal fees.

Closely related to who can make a request is the question of whether one must provide reasons for making the request. Again, the answer is similar. There is no obligation to explain why a request is being made and even if there were an obligation to do so, ensuring that requesters subsequently used information only in the manner indicated would prove administratively impossible. Nonetheless, program areas frequently get distracted by concerns about what the requested information will be used

for and the administrator must be alert to keep matters focused on the procedural requirements.

However, the purpose of a request may become pertinent in a number of situations. If an administrator knows why a requester is trying to obtain particular information, this may be of assistance in clarifying the request, thereby eliminating unnecessary searches, cutting down costs, and saving time, all of which are obviously to the requester's advantage.

The purpose of a request will also be relevant in those situations in which the requester's identity is a consideration. Not only does the purpose affect third party notifications,⁴⁴ fee waiver requests,⁴⁵ and application of the public interest override,⁴⁶ but it is of critical importance to the frivolous or vexatious requester issue. In addition, the requester's purpose becomes an important factor in the balancing exercise that takes place when deciding whether a disclosure will involve an unjustifiable invasion of an individual's personal privacy.⁴⁷

Of course a requester may decline to provide information concerning the purpose of the request. This is certainly the individual's prerogative but, in most cases, insisting on this will work to the requester's disadvantage, as well as taxing the access process. It becomes the administrator's task to explain this to a requester and, if possible, to elicit a more co-operative approach to the process.

Turning to issue of what may be requested, there are several key points requesters need to appreciate. The first is that aside from the continuing access provisions, the Fol process is confined to recorded information in existence at the time the request is made. A requester cannot compel an institution to answer questions, nor is the institution obliged to create a record that would respond to the request.⁴⁸ In practice, institutions may do this if it is not unduly onerous and frequently creating a record that responds to a request meets the needs of both the institution and the requester.

The requested information must also be in the custody or the control of the institution.⁴⁹ It is not possible to address the range of factors that affect the custody or control determination, but suffice it to say that some records that are on the institution's premises may not be in its custody or control but other records held off-site will be.

Even if a record is in an institution's custody or control, it may be excluded from the legislation's coverage. While most exclusions are very narrow, there is one important exception: amendments to the legislation in 1996 removed broad categories of labour relations and employment-related records which involve the institution in its capacity as an employer.⁵⁰

Finally, requesters must appreciate that records that are covered by the legislation still may not be accessible if they fall within any of the Act's exemptions. Although some exemptions are discretionary and can be waived, others are mandatory and the information must be withheld if the exemption applies, subject to the public interest overrides.

Assuming that access will be granted, a requester can ask for a copy of a record but may also ask to view the original unless it is not 'reasonably practicable'⁵¹ to permit this. Continuing access for up to two years may also be requested, assuming that access to the requested record is granted. The continuing access provisions can be particularly useful where specific types of records such as reports are generated on a regular basis.

The final concern is how to trigger the process. Quite simply, a request must be in writing and accompanied by the application fee. No form is required although they are available. The requester is expected to provide 'sufficient detail' so that an 'experienced' individual can locate the requested record with a 'reasonable effort'.⁵² Nonetheless, institutions are obligated to assist requesters in reformulating a request where it is deficient. Clarification of requests is fundamentally important to requesters, institutions and the access process as a whole. Not only can it save requesters time and costs but institutions can avoid unnecessary searches and, by narrowing the scope of a request, may reduce the potential issues to be addressed.

The Commissioner's office has emphasised the difference between clarifying requests and narrowing requests.⁵³ In practice, the two are closely related. Requests are often framed very broadly, sometimes out of an abundance of caution or perhaps even mistrust. In these cases, clarification will result in the request being more clearly focused but also much narrower in scope.

The request, once formulated, should be directed to the institution that the individual believes holds the records. However, even if a mistake is made in this regard, the institution receiving the request has an obligation to transfer it to the relevant institution.⁵⁴ In principle, the requester is not penalised by sending the request to the wrong institution because the legislation deems the 30-day response period to begin on the day the request was received in the transferring institution. Nevertheless, as a practical matter, a transfer, unless effected immediately, is likely to result in a delay in the response to the request.

Once the request is in the process, the attention moves to a requester's two main procedural concerns: how long does the process take and how much does it cost?

Issues of time and cost

As noted earlier, timeliness is a key aspect of the access process. The legislation makes clear that responses to requests are to be provided within 30 calendar days and a failure to comply can be treated as a deemed refusal which is appealable.⁵⁵ That being said, there are various circumstances in which the 30-day standard will not apply.

First, the legislation explicitly permits an institution to extend the 30-day time limit either because of the number of records requested or because of the need to conduct external consultations.⁵⁶ The legislation provides little guidance on the permissible length of the extension, simply defining it as 'reasonable in the circumstances'.⁵⁷ However, the requester must be informed of the length of

the extension, the reason for the extension, and the right to appeal.

Second, the 30-day period will be extended whenever it is necessary to notify a party whose interests may be affected by a decision to disclose a record.⁵⁸ The legislation tacks on an additional 30-day period to accommodate the notification process. However, third party notifications have the potential to generate much greater delays given that an affected party has the right to appeal an adverse decision on access.

Both the extension provisions and the third party notification process are factors requesters need to consider seriously when framing their requests. If a prompt response to the request is important, then requests need to be defined carefully so that distracting issues are minimised. For example, if third party information is not vital, a requester would be wise to remove this from the scope of the request. Administrators also have an interest in avoiding issues that may unduly complicate the process and will assist requesters in this regard.

In some cases, delay will occur when requesters do not provide the information needed to keep the process moving. This can include issues such as clarification of requests, agreement to proceed on fee estimates, and consent to be identified on third party notifications. In essence, the 30-day clock stops ticking until the requester provides the required information.

Cost is the other main concern for requesters. The legislation imports a user pay principle whereby requesters are expected to pay the processing costs prescribed in the regulations. However, there is also provision to waive fees and the administrative reality is that many of the costs that go into processing access requests are not chargeable.⁵⁹ Although the legislation is very specific about the types of processing costs that can be charged, including the specific fees that will apply, many requesters will have little idea how those provisions will affect a particular request. There may be no way for the requester to know in advance how many records exist, nor is it likely that the requester will appreciate the effort needed to retrieve the records. For these reasons, the legislation requires institutions to provide requesters with an estimate of any processing costs that may be required in excess of \$25.⁶⁰

The fee estimate serves as a very useful means of engaging the requester in discussions concerning the scope of the request assuming, of course, that it is being used to inform rather than deter. The institution is also entitled to request payment of a deposit with respect to any estimate in excess of \$100.⁶¹ The deposit requirement gives institutions some assurance that requesters will not simply walk away from the process after considerable resources have been expended retrieving the records. Nor is the institution required to continue processing the request until the fee deposit has been received.⁶²

When a request involves large numbers of records, the Commissioner has permitted institutions to base the fee estimate on a representative sample of the records.⁶³ This protects the institution's interests but insures that

requesters have a sound basis on which to make an informed decision whether or not to proceed with the request.

From the administrator's perspective, the fee estimate is a valuable tool that needs to be employed effectively. If the estimate is detailed and carefully prepared, it will assist the requester and will leave the institution well-positioned should there be an appeal. This should also avoid the possibility that the Commissioner would preclude the institution from charging fees where it appears that the estimate has not been generated with sufficient care.⁶⁴

A final word on fees is useful. There have been some suggestions that fees are too high and may be deterring use of the legislation.⁶⁵ While there may be some merit to this with respect to appeal fees, the case is less persuasive with respect to application fees and processing fees. As noted earlier, the application fee has largely eliminated the frivolous or vexatious requester problem, a considerable benefit to the system as a whole. With processing fees, there is good reason to believe that many requesters are never asked to pay for various costs that could be charged.⁶⁶ However, this will not be reflected in the Commissioner's annual reports if there has been no formal decision by the administrator to record this as a fee waiver. The result is that fee waivers are likely under-reported and some scepticism with respect to claims about the impact of fees on the exercise of access rights may be warranted.

The access decision

The fundamental point in the access process comes when a substantive decision on access is made. Several outcomes are possible. The requester may get all of the requested records, some of the requested records, or none of the requested records. In all three situations, including full access, the institution needs to address carefully all potential issues which may form the basis for an appeal.

Where access is denied, in whole or part, there are several possible reasons. The records may be excluded or not in the custody or control of the institution, they may be exempted, or there may be no records that respond to the request. All of these responses are appealable. Even when full access is granted, a requester may have concerns about the quality of records that have been provided or may challenge the institution's claim that there has been full disclosure.

The legislation compels institutions to explain the basis for a denial of access and although it does not spell out the amount of detail required,⁶⁷ considerable direction is provided by the Commissioner's decisions, its Practice Direction on drafting decision letters,⁶⁸ and the Management Board Secretariat's *Freedom of Information Guideline*.⁶⁹ What is clear is that institutions are expected to do far more than make passing reference to the sections of the legislation that are being relied on to deny access. There should be a serious attempt to explain how a particular section applies to a record, or a portion of a record, that is being exempted or excluded. When no responsive records can be located, the institution should include

details of the search conducted and ought to include applicable records retention schedules where relevant.

Effective decision letters can be extremely time-consuming to produce but they are vitally important. Not only do they inform requesters of the basis for a decision but they reduce the chance of an appeal, thereby saving resources. They also leave the institution well-positioned to respond if there is an appeal and they enhance an institution's credibility just as a poorly drafted response is likely to do the opposite.

Conclusion

Making the Fol access process function effectively is a challenging undertaking. Largely it involves an ongoing balancing exercise. Faced with a range of competing pressures and expectations, the administrator must constantly educate and persuade, prod and scrutinise, negotiate and advocate, all in order to keep parties constructively involved in the access process. To the extent that the administrator is successful, the principle of access to information becomes realised in practice.

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References

1. This is an intentional reference to Paul Weiler's 'The Administrative Tribunal: A View From the Inside', (1976) 26 *U.T.L.J.* 193. This article was first published in the *Advocate's Quarterly* Vol 26, September 2002, 1-22. Reprinted in the *Fol Review* with permission.
2. Weiler was endorsing a viewpoint advanced by John Willis: *ibid.*, at p.193.
3. The provincial *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (FOIPPA) and the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 (MFOIPPA) are very similar, so this article will refer uniformly to 'the legislation'.
4. For example, see Robert Botterell, 'Access to Information: A Comparative Analysis of the Policy Advice Exemption' (1991) 5 *C.J.A.L.P.* 180 and Gregory Levine, 'Disclosure of Information in the Public Interest Pursuant to Freedom of Information and Protection of Privacy Legislation' (1997) 11 *C.J.A.L.P.* 1. A notable exception is Grant Huscroft's very comprehensive overview of the legislation. Unfortunately, given when it was written, the analysis was necessarily speculative. See 'The Freedom of Information and Privacy Act: A Roadmap for Requesters' (1990), 11 *Adv. Q.* 436.
5. For example, Alasdair Roberts has suggested that Ontario's fee increases have dramatically affected use of the legislation. (See 'Less Government, More Secrecy: Reinvention and Weakening of Freedom of Information Law' (2000), 60 *Pub. Adm. Rev.* 298). As will be discussed subsequently, fee increases certainly affected the use of the legislation by frivolous and vexatious requesters, but it is not so clear that there was any great impact on other users. Those inside the process would be more likely to appreciate this point.
6. In some cases more information will be available to parties outside the freedom of information (Fol) process. For example, Cabinet records are protected by a mandatory exemption in the FOIPPA (s.12) and are not subject to the s.23 public interest override. However, the same records may be accessible outside the Fol process even if shielded by the doctrine of Crown privilege, more commonly referred to now as public interest immunity. The author has examined this issue elsewhere. See 'Crown Privilege: A Troubled Exclusionary Rule of Evidence' (1984) 10 *Queen's L.J.* 135.
7. This article will use the generic term 'administrator' to describe the individual responsible for managing the process. This will avoid

- confusion that may result from the prevalence of different terms such as Access Co-ordinator or Fol Co-ordinator. Nor is everyone who is responsible for the process identified by such a title.
8. This article will use the generic term 'administrator' to describe the individual responsible for managing the process. This will avoid confusion that may result from the prevalence of different terms such as Access Co-ordinator or Fol Co-ordinator. Nor is everyone who is responsible for the process identified by such a title.
 9. For example, institutions are obliged to assist requesters in reformulating their requests where necessary. See s.24(2) FOIPPA and s.17(2) MFOIPPA.
 10. From a requester's perspective, timeliness has a substantive aspect. Not only is a requester entitled to have access to information; the requester also has a right to obtain that information in a timely manner.
 11. There are several factors to consider in deciding to proceed with an appeal. First, there is the cost of preparing and presenting the appeal. Second, there is the risk of an adverse precedent. Third, there could be significant compliance costs if the institution is ordered to proceed with the request but is precluded from either charging fees or extending the time limits.
 12. These problems have been documented repeatedly by access commissioners, particularly at the federal level. See, for example, the *Annual Report of the Access to Information Commissioner for 2000-2001*. In particular, see Chapter I: 'Restoring the Foundations of Accountability'.
 13. An entire section of the Management Board Secretariat's *Freedom of Information Guideline* is devoted to resource issues. See 'Determining Appropriate Resource Levels'. The guideline is available on the Management Board Secretariat's website at www.gov.on.ca/MBS/english/fip.
 14. This issue has been addressed in a number of Information and Privacy Commissioner (IPC) orders. For example, see Order P-28 (December 6, 1988). All IPC orders and practice directions are available on the IPC website at www.ipc.on.ca/english/index.htm.
 15. Hudson Janisch makes a similar point in the rule-making context, noting that '... most lawyers are not concerned with the overall effective functioning of the administrative system. They are concerned to get results for individual clients and that involves the maximum discretion and flexibility.' See 'Further Developments with Respect to Rulemaking by Administrative Agencies' (1995) 9 *C.J.A.L.P.* 1 at p.8.
 16. Former Assistant Commissioner Irwin Glasberg noted that in early 1991, one appellant had generated 50% of the appeals in the system (over 600 appeals). See Irwin Glasberg, 'Working With Demanding Clients' in *Access Reports: Canada and Abroad*, Vol. 4, No. 12, December 19, 1996.
 17. Where there is 'reasonable doubt' about whether there would be an invasion of personal privacy, notice is required. See Order PO-1657 (February 16, 1999). The decision not to provide notice is itself appealable. See Order PO-1694 (July 9, 1999). However, this right is only meaningful if a party is aware that the issue is being considered. For example, if notice is provided with respect to some records, the decision not to provide notice on other records can be appealed. But if notice is not provided in the first place, this opportunity will almost never arise.
 18. The federal Access to Information Commissioner has repeatedly championed the role access administrators play and has urged government institutions to 'nurture and support' these individuals. See the Access to Information Commissioner's annual report for 1998-1999 at p.13.
 19. For example, a program area may be able to provide information concerning the expectation of confidentiality a party expressed when it provided information.
 20. As an example, IPC Order P-81 (July 26, 1989), which dealt with the manner in which a fee estimate involving numerous records should be calculated, resulted in the Ministry of Labour having to retrieve and review all of the records in issue even though the Commissioner acknowledged that this was not consistent with the approach endorsed in the order. The resulting compliance time was over 1700 hours, a point subsequently used by the author to impress upon program areas the need to take proper care in preparing fee estimates.
 21. See s. 25 FOIPPA; s.18 MFOIPPA.
 22. See s. 25(2) FOIPPA; s.18(2) MFOIPPA.
 23. See the Access to Information Commissioner's annual report for 1991-1992 at p.19.
 24. See *IPC Backgrounder for Senior Managers on the Role of Information and Privacy Co-ordinators Relating to Access to Information* (September 1999).
 25. Although the Commissioner is adjudicating rather than advocating, it may be apparent during mediation which direction the Commissioner is likely to take. If this is confirmed by the Commissioner's order, the institution's option will be to attack the 'reasonableness' of the order on judicial review. At this point, the underlying adversarial aspect of the relationship is fully revealed.
 26. This is in striking contrast to other legislation where both the access and privacy processes are clearly referred to. For example, the Alberta and British Columbia statutes contain explicit references to privacy complaints and the Commissioner's authority to deal with those complaints. See *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F.18.5, ss.51(2) and 62; *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, ss.42(2) and 52(1).
 27. Order P-81 is an example. See supra, footnote 20.
 28. See s.52(4) FOIPPA; s.41(4) MFOIPPA.
 29. See s.52(8) FOIPPA; s.41(8) MFOIPPA.
 30. The Commissioner has exercised these powers, which makes them credible as points of leverage for the administrator.
 31. The author has criticised this tendency in an earlier article. See 'Deference in Name Only: Judicial Review of Ontario's Information and Privacy Commissioner' (1998), 20 *Adv. Q.* 304 at pp.319-21.
 32. For an excellent discussion of the use of guidelines, policy statements and rules to structure the exercise of administrative discretion, see K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Chicago, University of Illinois Press, 1971). In particular see pp.102-3.
 33. The author strongly favours the use of rulemaking as a means of developing agency policy and has discussed this at length elsewhere. See 'Policy Development by Labour Relations Boards in Canada: Is there a Case for Rulemaking?' (2000), 25 *Queen's L.J.* 479.
 34. See s.4 of the *Access to Information Act*, R.S.C. 1985, c. A-1.
 35. See IPC Practice Number 16, *Maintaining the Confidentiality of Requesters and Privacy Complainants* (September 1998).
 36. *Ibid.*
 37. The definition of 'personal information' is extremely broad, encompassing 'recorded information about an identifiable individual' (see s.2 FOIPPA, MFOIPPA). However, the Commissioner has clearly established that, generally, information about individuals operating in an official or professional capacity will not be treated as personal information. Therefore, it follows that the identity of business or organisational requesters cannot be protected on the basis of personal privacy considerations.
 38. From the author's experience, a primary concern of many affected third parties who receive notification concerning a request is the identity of the party requesting the information.
 39. One of the factors to be considered in deciding whether to waive fees is 'whether the payment will cause a financial hardship for the person requesting the record'. See s.57(4)(b) FOIPPA; s.45(4)(b) MFOIPPA.
 40. The IPC has repeatedly held that to trigger the public interest override (s.23 FOIPPA; s.16 MFOIPPA), there must be a 'public' interest rather than a personal or private one. See Order P-12 (August 3, 1998).
 41. *Supra*, footnote 16.
 42. See ss.24(1.1) and 27.1 FOIPPA; ss.17(1.1) and 20.1 MFOIPPA.
 43. The mandatory application fee is \$5, the appeal fee for one's own personal information is \$10, and the appeal fee for general records is \$25. See R.R.O. 1990, Reg. 460 (FOIPPA), ss.5.2 and 5.3, as am. by O. Reg. 21/96; R.R.O. 1990, Reg. 823 (MFOIPPA), ss.5.2 and 5.3, as am. by O. Reg. 22/96.
 44. Not only do affected third parties want to know who is making a request but they frequently want to know why the information is being requested. From the author's experience, knowing why someone wants the information may incline some third parties to consent to disclosure when they would otherwise object.
 45. Fees may be waived where 'dissemination of the record will benefit public health and safety'. See s.57(4)(c) FOIPPA; s.45(4)(c) MFOIPPA.
 46. Purpose is clearly relevant to determining whether a private or public interest is being advanced. *Supra*, footnote 40.
 47. The balancing of factors under the personal privacy exemption has been greatly circumscribed as a result of the Divisional Court

- decision in *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 106 D.L.R. (4th) 140, 13 O.R. (3d) 767 (Ont. Ct. (Gen. Div.)). The author has strongly criticised this decision on legal and policy grounds. See 'Deference in Name Only', supra, footnote 31, particularly at pp.311 to 314.
48. See, for example, Orders P-17 (October 6, 1988) and P-231 (May 6, 1991).
 49. See s.24(1)(a) FOIPPA; s.17(1)(a) MFOIPPA.
 50. See s.65(6) FOIPPA; s.52(3) MFOIPPA.
 51. See s.30 FOIPPA; s.23 MFOIPPA.
 52. See s.24(1)(b) FOIPPA; s.17(1)(b) MFOIPPA.
 53. See IPC Practice Number 15, *Clarifying Access Requests* (March 2000).
 54. Supra, footnote 21.
 55. See s.29(4) FOIPPA; s.22(4) MFOIPPA.
 56. See s.27 FOIPPA; s.20 MFOIPPA.
 57. See s.27(1) FOIPPA; s.20(1) MFOIPPA.
 58. See s.28 FOIPPA; s.21 MFOIPPA.
 59. The regulations specifically spell out what costs can be charged. (See R.R.O. 1990, Reg. 460 (FOIPPA), ss.6 and 6.1; R.R.O. 1990, Reg. 823 (MFOIPPA), ss.6 and 6.1). Significant components of the access process are not chargeable, in particular the time required to review records and to conduct internal consultations. Of course, there are good policy reasons to preclude charges here given the possibility of fees being grossly inflated.
 60. See s.57(3) FOIPPA; s.45(3) MFOIPPA.
 61. See R.R.O. 1990, Reg. 460 (FOIPPA), s.7(1); R.R.O. 1990, Reg. 823 (MFOIPPA), s.7(1).
 62. Ibid.
 63. See Order P-81, supra, footnote 20.
 64. This was a factor that partially influenced the outcome in Order P-81, *ibid.*; there being no question that the set of fee estimates that were appealed were clearly inadequate.
 65. This has been raised by the Commissioner in her Annual Reports for 1998 and 1999. It has also been suggested by Alasdair Roberts in a number of articles. See, for example, 'Closing the Window: How Public Sector Restructuring Limits Access to Government Information' (1999), 17 *Government Information in Canada*. Also see 'Less Government, More Secrecy', supra, footnote 5, at p.306.
 66. Although Alasdair Roberts has suggested that fee changes have had an impact on the use of the legislation, he has acknowledged that in many cases fees that would be charged are informally waived. See 'An Evidence-Based Approach to Access Reform', Working Paper #22 (School of Policy Studies, Queen's University, July 2001) at pp.13-17.
 67. See s.29 FOIPPA; s.22 MFOIPPA.
 68. See IPC Practice Number 1, *Drafting a Letter Refusing Access to a Record* (September 1998).
 69. Supra, footnote 13. See the entry 'Decision Letters' in the section entitled 'Process Improvements'.

Excluding prisoners from Fol in Victoria

This article examines in detail, a freedom of information (Fol) application which took 510 days to complete, and the extraordinary lengths to which prisoners in Victoria have to journey to gain access to information.¹ I will touch on the growing trend to place prisoners outside of the rule of law, and the practice of the Ombudsman to deal with the systemic problems of the Fol system in a piecemeal and ineffectual fashion.

In the *Freedom of Information Review* No. 89, October 2000, pp.69-70, Nicole Tyson took a broad overview of the situation in relation to prisoners using Fol laws to access information. Ms Tyson outlined the submissions that were made to the Legal, Constitutional and Administrative Review Committee in Queensland, which was considering whether the *Fol Act* (Qld) should be amended to restrict prisoners' access to information. The submissions of police and prison authorities sounded very familiar. The 'dangers', they warned of were all nebulous; prisoners 'may use' and 'could use' information in a certain undesirable way. Prisoners being stupid and dishonest, 'may misinterpret' and then 'misuse' the documents. Then there were the claims of 'alleged' threats. Some of the submissions went so far as to say there were 'some threats' and that 'some incidences' of 'harm' had been reported. The only 'harm' that could be done would be that which would flow from the discovery of falsehoods generated in documents which prisoners then challenged. Suggestions that the release of 'prison files' to a prisoner, could 'negatively impact on their progress through the court system' is incomprehensible to me and I have been engaged with the prison system, Fol laws and the courts at all levels for the past 15 years. The situation in Queensland is just one more step along the road to unambiguously making prisons autonomous islands which are outside the rule of law.²

Prison authorities see themselves as a Secret Service and not a Public Service. They arm themselves with high walls and nebulous catch-all-terms like 'security' and 'prison discipline' which rarely face a critical challenge. People in custody also experience the distasteful and discriminatory sub text of being categorised as an 'other', namely 'prisoners', and this is explicit in the interactions between the justice system, the state and the society. The word, 'prisoner' is written by those in authority, and most often read by anyone who holds any power whatsoever, with the inflection that a drunken bigot would put on the word 'Jew!' or 'Black!'

The culture of concealing of information gives rise to a type of secret state in Australia's prisons, but at the same time prisoners, their families and lawyers have no level of privacy. Phone calls, visits and mail are routinely recorded and held on prison files; including those between prisoners and their lawyers. Prisoners do not have any effective right to legal professional privilege.³ The matter of prisoners claiming legal professional privilege was agitated in *Smith v Commissioner of Corrective Services* [1978] 1 NSWLR 317. Smith was claiming that the facilities for visits with lawyers were inadequate to ensure confidential communication with his lawyer. Even though a prisoner is in the custody and care of the state, and even though there should be a common law duty of care exercised by the prison administrators to ensure that a prisoner's rights are not violated, Hutley JA found in *Smith* that:

The privilege is a right to make confidential communications to legal advisers, it is not a right to require other persons to provide all the facilities necessary to enable such communications to be kept secret ...⁴

But to return to the reality of an Fol application for a prisoner in Victoria, it is impossibly hard for any person in

custody, unless they have a longer than average sentence, and unless they are educated in administrative law, and are tenacious in the extreme, to be successful. In what follows I will detail an FoI request which I categorise as being relatively easy. It was easy in that there was no objection made to the waiver of fees, and no exception from release was claimed in relation to the documents. However, it took 510 days to complete. Applications where fees or exemptions are an issue usually take much longer.

Chronology of events

24 October 1999. I made an application to the Department of Justice (the DOJ) for access to documents. I will reproduce my request in full to illustrate the details that I find it necessary to go into:

I am a prisoner at Port Phillip Prison ('PPP') and I make an Application for access to documents under the provision of the *Freedom of Information Act 1982*, ('the Act').

Background information: Since the introduction of the Arunta Phone System into Victoria's prisons I have been an inmate in Barwon Prison and PPP. The provision of this phone system is best categorised as the unconscionable exploitation of prisoners for profit by the imposition of a poor quality and overpriced service. I have no choice of service provider, or rates of charge. I am forced to rely on this phone system to maintain family relationships, access to lawyers and the Courts.

Details of documents requested: I request access to documents which will identify the times and dates that the Arunta phone System is 'down' or not operating because of fault at PPP. The scope of my request is for the past 12 months to date.

This is not an unreasonable request: These documents directly impact upon my personal situation as I am paying for the use of the phone system and I am disadvantaged when it provides a poor level of service at an excessive cost.

The manner in which this request is to be dealt with: This is an FoI Application made under Part III of the Act and all the other provisions of the Act. An FoI Application is a legally enforceable right, see section 13 of the Act, and I insist that this Application be processed with all of the required formalities. Please do not handball my Application out of bounds through the use of section 16 of the Act. The practice of the DOJ handballing requests out of bounds by selectively supplying information outside of the provisions of the Act has come to a head before. In a letter to me dated 14 August 1997 from Dr Perry, (ref: N/656gs), the Victorian Ombudsman wrote:

'Note that in view of the problems highlighted by your FoI application, the Department of Justice has decided that processing of requests for documents outside of the *Freedom of Information Act 1982*, as detailed in Section 16 of the legislation, will not now occur. Instead, request of this nature⁵ will be dealt within terms of the FoI process. The decision was taken after consultation with this office.'

Fees associated with this request: I request that the fees for processing this request be waived as I am an impecunious person. The test for impecuniosity is discussed in *Re Larson and Office of Corrections* (AAT of Victoria, Howie PM, 19 June 1990). The Act requires that fees and charges be waived to avoid hardship to a person seeking access to documents. I receive \$30.00 per week for work I am compelled to perform under the provisions of the *Corrections Act 1986*, 20% of which is withheld for my release or to pay prison fines. I occasionally receive \$100.00 per month of private money. If you were to insist that I pay an application fee of \$20.00, you would in effect be asking me for a weeks wages or a weeks entitlement of private money. This would equate the application fee to a level of hundreds of dollars for a normal wage earner, and clearly the drafters of the legislation did not envisage that scale of fees and charges. The Ombudsman has also considered the matter of fees in relation to a prisoner seeking access to information about

the prisoners' phone system from the DOJ. In a letter dated 18 June 1999, (ref: N/99/894/jk), it was advised that:

'Mr Harmsworth [secretary to the DOJ] states that he has asked the Department [of Justice] to review the practice requiring prisoners to make out a case for hardship when non-personal documents are involved, particularly where the non-personal documents may directly impact on their personal situation ... prisoners in custody applying for such non-personal documents will not be required to pay the fee.'

I look forward to your earliest possible response.

You may think that this is a long and complicated application, but if I do not write in such detail in the first instance, then I am fobbed off with claims for fees and attempts to release a small percentage of documents outside of the FoI process under s.16, and then the agency refuses to deal with any further requests by claiming that they have released the documents, and so on. I quite often detail what office or person holds the documents. If the application is in relation to documents that I think they will restrict access to by claiming commercial confidentiality, I make these additional arguments:

Legal basis for releasing documents: Section 9F of the *Corrections Act 1986* provides for the provisions of the Act to apply to the release of documents in relation to services provided to corrections, like the phone system. As you will be aware, the Court of Appeal has recently upheld the decision of the Supreme Court, that the public interest favoured disclosure of information in relation to the contractual arrangements between the State and private prison providers. The Appeal Court went on to say that the arguments put forward by the State and others (you) that commercial confidentiality exemptions should apply did not amount to a compelling argument. See: *CBCLFCC v DOJ & ors* [1999] 15 VAR 208.

On 29 October 1999, the DOJ acknowledged my application of 24 October 1999.⁶ On 22 November 1999, the DOJ claimed that no documents exist which are under its control.⁷ On 27 November 1999, I lodged a complaint about the DOJ to the Ombudsman and requested an investigation. On 8 December 1999, the Ombudsman acknowledged my complaint.⁸ And on 18 January 2000, the Ombudsman advised that 'enquiries' are still being conducted.⁹

The Ombudsman did not conduct an 'investigation' but pursued the matter via informal enquiries. The primary function of the Ombudsman, as defined in s.13 of the *Ombudsman Act 1973* (Vic), is to conduct 'investigations' of administrative action. However, the Ombudsman has never acted on this primary function, preferring an informal and expedient approach.

It should be appreciated that such was the refusal of the Ombudsman's office to investigate matters and exercise its legal duty that an amendment to the Act was required to bring the practice of the Ombudsman in line with the statutory requirements.¹⁰ The Ombudsman has independent powers of investigation and persuasive powers, but they are rarely used in favour of informal inquiries. The *modus operandi* is explained by the Ombudsman as expediency. The Ombudsman rationalises thus:

Although under the *Ombudsman Act* I have the power to formally obtain information from an authority, I find that it is far more expedient to obtain information from an authority on an informal basis where officers of authorities volunteer information regarding a complaint I have received.¹¹

In my 15 years in prison I have never personally known of a prisoner's complaint being officially substantiated by the Ombudsman. And this is not surprising when you consider that in the 1999/2000 Annual Report of the Ombudsman the history of prison complaints is detailed. It is revealed that in 1997/98 there were 787 complaints from prisoners and that only one of those was formally investigated and sustained. In 1998/99 there were 771 complaints from prisoners to the Ombudsman and not even one of those was formally investigated. In 1999/2000 there were 562 complaints from prisoners and just one of those was formally investigated and sustained.¹² And in the 2000/2001 Annual Report it is revealed that there were 746 complaints from prisoners and one of those was formally investigated and sustained.¹³

A complaint to the Ombudsman is so ineffective that prisoners view it as not being worth the time and effort.¹⁴ The ineffectiveness of the Ombudsman's office is widely known, for example:

Kate Lawrence is a lawyer with the North Melbourne legal centre, which represents many inmates. 'The Ombudsman's office is terribly ineffectual,' she says. 'Essentially what they do is go to the people you have complained about, get their story and say, "there is your answer".' You already knew that. The fact that nothing happens can exacerbate frustrations. In terms of teeth, the Ombudsman is a gummy shark. Prisoners don't view it as a serious option.¹⁴

As an aside, those complaining about the police fare a lot better than prisoners making complaints about corrections. In 2001/2002 the Ombudsman investigated 1575 specific complaints against the police, and the net substantiation rate was 21%.¹⁶ At least 21% is better than prisoners fare, in 2000/2001 the net substantiation rate of prisoners' complaints was zero.¹⁷

On 31 January 2000, the Ombudsman advised that his office had suggested to the Fol Manager of the DOJ that a second search should be conducted at PPP to ascertain if a log of the phone system down times existed. That a log was in fact found at PPP. And as the first search was less than thorough, the Office of the Correctional Services Commissioner (the OCSC) was asked to write to PPP and remind them of their obligations under the *Fol Act*.¹⁸

On 6 February 2000, I wrote to the Fol Manager of the DOJ referring to the above advice from the Ombudsman and asked for the documents to be supplied to me, including the documents to the current date as four months had passed since my application was first received by the DOJ. On 7 February 2000, the Fol Manager of the DOJ supplied 19 pages of a log, of the times the phone system experienced faults, and claimed that it was a copy of the log in total.¹⁹

On 11 February 2000, I complained to the Ombudsman that all of the pages of the log appeared not to have been supplied, and that the veracity of the documents supplied seemed questionable. I complained that a number of pages appeared to be missing. And that, from the fax details at the top of each page, it appeared that two copies of the log had been sent from PPP to the DOJ on different days. I requested that the Ombudsman investigate the matter.

Then on 29 February 2000, the Fol Manager of the DOJ, responded to my letter of 6 February 2000 and claimed that all documents have been supplied and that my letter of 6 February was being treated as a new application.²⁰

On 2 March 2000, the Ombudsman acknowledged receipt of my letter dated 11 February 2000.²¹ On 11 April 2000, the Ombudsman advised that enquiries were still in progress.²² On 15 May 2000, the Ombudsman advises that enquiries are still in progress.²³ On 21 December 2000, the Ombudsman advised that there had been correspondence between the Secretary of the DOJ about the discrepancies in the documents supplied to me and that an officer from the office of the Ombudsman had examined the documents at PPP and found more discrepancies. The Ombudsman again wrote to the Secretary of the DOJ regarding the discrepancies. I was then advised that the discrepancies were all due to confusion and a full copy of the document would be supplied to me.²⁴

On 23 January 2001, I complained to the Ombudsman that I had still not received a full copy of the document. On 5 February 2001, the Ombudsman advised that there had been some confusion as to who was going to supply the documents and that they would soon be supplied.²⁵ Then on 5 February 2001, I received a letter from Kelvin Anderson, Director of PPP, supplying the missing pages of the log as per my Fol application of 24 October 1999.

Under the cover of a letter dated 24 February 2001, I wrote to the Ombudsman and said:

This Application was first made on 24 October 1999. I have finally received all of the documents from Group 4 after your prompting. It is disappointing to note that I have had to drive this process every step of the way as if I were driving a recalcitrant donkey up a muddy slope. At every step of this simple Fol Application I have had to complain that the process was not being correctly followed according to the law.

Your office, in responding to my complaints has prodded the DOJ, and the Secretary of the DOJ has, on two occasions, prodded the OCSC to remind Group 4 of its contractual and legislative obligations. I wonder what would have happened if I was not ensuring compliance with the Fol laws? (Don't bother answering, I know what would happen - *nothing!*) So to take a brief overview the 510-day Fol campaign:

1. 24 October 1999, the Application is made;
2. The DOJ claims that there were no documents;
3. I complained to you;
4. You intervened and requested a second search;
5. Documents were found;
6. The Acting Secretary of the DOJ asks the OCSC to remind Group 4 of its obligations;
7. Not all of the documents were supplied;
8. I complained to you;
9. You intervened;
10. Misplaced documents are found,
11. You advised that all documents would be supplied to me;
12. The Secretary of the DOJ asks the OCSC to remind Group 4 of its obligations;
13. The documents were not supplied;
14. I complained to you; *and finally*
15. On 8 February 2001 the documents were supplied to me.

As you well know, this is hardly a worst case example. However, it is not what you would call a streamline working of the Fol laws is it? Perhaps your office should consider preparing an overview of the moribund reality of Fol in Victoria rather than dealing with

the same complaints and the same problems *over and over again*. I am sure that your office would see a pattern in the frustration of FoI Applications. And just perhaps you could report that to the Government as an area of concern that should be looked into.

On 16 March 2001, the Ombudsman responded and said that I should note the conclusions that he had drawn in relation to this matter and that, as a result, I had received all of the documents.²⁶ On 22 March 2001, I wrote to the Ombudsman and said:

As always, you miss the point. Yes, I did receive all of the document. And yes I know what conclusions, if you can call them that, which you had drawn; they were:

1. That the search for documents was less than thorough;
2. That the OCSC and the DOJ should remind Group 4 of its legal obligations; and
3. That there was a mix up as to who was going to supply the log.

What do these 'conclusions' have to do with the general issue raised in my letter of 24 February 2001? In short, nothing. My letter of 24 February 2001 went to a wider issue. The issue being that I, with the intervention of your office, have to reinvent the FoI wheel every single time! This is the point of my letter of 24 February, a point I make very clear. My letters are never ambiguous, so why do you consistently misinterpret them and respond to non-issues of your invention?

On 27 March 2001, the Ombudsman responded and simply acknowledged receipt of the above letter and said that he has 'noted the contents'.²⁷ I wonder what that means, whatever it does mean I am sure it does not mean that there will be any action taken.

Conclusion

The FoI application detailed above does not represent one of the worst cases I have suffered. In fact it is not too bad, as I actually received the documents.²⁸ But, it does demonstrate how difficult it is to obtain documents, and how difficult it is to encourage the Ombudsman to do anything other than deal with issues in a piecemeal fashion.

In the case examined above I received all of the documents that I requested; however, I have titled this article 'Excluding prisoners from FoI in Victoria'. I have done this, because when it takes so very long, and when such a convoluted path has to be travelled, prisoners are effectively excluded when they cannot surmount the obstacles.

The reality is that most prisoners are not in custody long enough to see an FoI Application through to completion. The same is true of a complaint to the Ombudsman. In 1998/99, for example: 75% of male and 88% of female inmates received a sentence of 12 months or less.²⁹ In relation to a complaint to the Ombudsman, in one case that I know of, a Mr Chris Callaghan, complained in October 1998 about the Melbourne Custody Centre. His complaint was that the Custody Centre had no natural light, poor ventilation, no fresh air or access to the natural environment, that prisoners were assaulted and staff took no action to assist them. The Ombudsman replied in a letter dated 17 July 2000, advising that all was well and that the hard pressed and hard-working police officers were doing their best. There was no advice as to why it had taken 20 months to reply.³⁰

Men and women in custody, and their families, feel the impact of governmental control over every aspect of their

lives more than any other people in the community. Whether a person in custody does, or does not, receive clothing, food or water, is a matter that is at the discretion of a prison manager with little chance of a review of that decision.³¹ And there is a raft of case law and legislation that is, in reality, securing the place of 'the prison' as an autonomous entity outside of the rule of law.³²

In this age of information, it can be said that information about your affairs is part of who you are as an individual. And when that information is concealed the individual starts to feel as invisible as the documents that cannot be released. The concealment of information, and the suppressing of individual humanity has become part of the prison power game in the form of the convoluted processes I experienced above.

I hear prisoners say: 'When I was a real person ...' meaning: 'When I was outside ...' I say this myself because there it is a kind of reverse empowerment in accepting the lowly status and then throwing it back in the faces of the people who profess to be the forces of law and order in an egalitarian society, but who are in fact the forces of discrimination and oppression. There is, however, a very real problem associated with the exclusion of people from society to a point where they are considered, and come to view themselves as non-humans. And that problem is that the pain experienced because of that exclusion will be returned ten fold, when those dehumanised and disenfranchised people are released into a community to which they owe nothing but bitterness.

CRAIG MINOGUE

Craig Minogue is a prisoner in Port Philip Prison.

This article was written in early 2002.

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2. For a cogent examination of judicial deference to prisons at the expense of prisoners legal and civil rights see: Richard Edney, 'Judicial deference to the expertise of correctional administrators: the implications for prisoners rights' in (2001) 7(1) *Australian Journal of Human Rights* 91-133.
3. See: Matthew Groves, 'Any Privilege for the Unlucky? Unrepresented prisoners and legal documents.' (1997) 22(1) *Alternative Law Journal*. And see: Craig Minogue, 'Re legal professional privilege' (Letters Page) (1992) 17(6) *Alternative Law Journal*.
4. *Smith v Commissioner of Corrective Services* [1978] 1 NSWLR at 327.
5. A request for non-personal information which directly impacted on my personal affairs.
6. From K. Maikousis FoI Manager, DOJ reference: 1999/2000-00104.
7. From K. Maikousis FoI Manager, no reference.
8. From B.W. Perry, reference: N/99/969/letter 1.
9. From B.W. Perry, reference: N/99/969/letter 4.
10. Part IIIA was inserted by Act No.2, 1989, s.9. This instituted a new section, 13A, which gave the power to conduct an enquiry for the purposes of determining whether an investigation under the Act should be conducted or if it was a matter can be resolved informally. Information drawn from Emiliios Kyrou & Jason Pizer, *Victorian Administrative Law*, LBC Information Services, 1998. (Current to January 2001).
11. Letter to me from the Ombudsman, Dr B.W. Perry dated 3 July 2000, his ref: \199051021.
12. *1999/2000 Annual Report of the Ombudsman* (Part C), pp.34-9. Complaints from prisoners to the Ombudsman represent 20% of all complaints to that office, see p.34. Prisoners complaints were

- about: (in this order of frequency) visits, medical issues, employment/funds, drug testing, lost and damaged property, classification/protection, mail/phones, disciplinary charges and hearings, see p.35.
13. *2000/2001 Annual Report of the Ombudsman* (Part C), p.56.
 14. It is not unusual for complaints to the Ombudsman to take many months or years to be finalised. The reality is that most prisoners are not in custody long enough to see a complaint to the Ombudsman through to completion. In 1998/99 for example: 75% of male and 88% of female prisoners received a sentence of 12 months or less: *Report of the independent Investigation into the Management and Operations of Victoria's Private Prisons*, October 2000, p.12. **One example of delay.** Mr C. Callahan complained to the Ombudsman (Victoria) in October 1998 about the Melbourne Custody Centre. He complained that the Centre has no natural light, poor ventilation, no fresh air or access to the natural environment and that he witnessed a person being assaulted by other prisoners and that the police did not come to the assistance of the victim. The Ombudsman replied in a letter dated 17 July 2000, (his ref LP/057598), saying that all was well and that the hard pressed and hard working police officers were doing their best. There was no advice as to why it had taken 20 months to reply — this is not an unusual length of time for a complaint to be finalised by the Ombudsman in Victoria. Such a delay, it can be argued, is *prima facie* evidence of bad faith.
 15. Murray Mottram, 'Does the watchdog have enough bite?' *Age* (news extra section), 6 January 2001, p.3.
 16. *2000/2001 Annual Report of the Ombudsman* (Part B), pp.26-7.
 17. *ibid*, (Part C), p.56.
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 22. From B.W. Perry, reference: N/99/969/letter 12.
 23. From B.W. Perry, reference: N/99/969/letter 13.
 24. From B.W. Perry, reference: N/99/969/letter 17.
 25. From B.W. Perry, reference: N/99/969/letter 19.
 26. From B.W. Perry, reference: N/99/969/letter 20.
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 28. The documents released showed that the prisoners phone system suffered from 150 significant failures in a 12-month period.
 29. *Independent Investigation into the Management and Operation of Victoria's Private Prisons*, October 2000, p.12.
 30. From B.W. Perry, to Mr Chris Callaghan of PPP, reference: LP/057598.

A review of the Annual Reports of the Office of Information Commissioner in Queensland 1999–2002

Introduction

The Annual Reports for 1999–2002 indicate that Queensland's Information Commissioner has consistently worked towards increasing the number of reviews finalised and the efficiency with which resolution was achieved. The Information Commissioner has always promoted the desirability of resolving review applications informally; however in cases where formal decisions have been required, the high calibre of his written decisions have had an educative role for the agencies which administer freedom of information laws (Fol), and the precedents that have been set have provided a fast and efficient framework for future decisions to be made. As a testament to the soundness of the formal decisions, in the nine years existence of the Office of the Information Commissioner, the Supreme Court has upheld the Information Commissioner's original decision in every instance.

The position of Information Commissioner was created to provide Fol applicants with a mechanism of review that was 'cheap, accessible, free from technicality, informal, expeditious and specialised'.¹ These values were reflected in the goals set by the Information Commissioner during the 1999/2002 annual reporting periods. With each goal having been given performance indicators (see Table 1), they provide a good opportunity to evaluate the Office of the Information Commissioner over a period of several years. The goals are listed below:

- Goal 1: To provide a high standard of dispute resolution under the *Freedom of Information Act* 1992 (Qld) (the *Fol Act*)
- Goal 2: To foster flexible and informal dispute resolution
- Goal 3: To have an educative influence on both the agencies administering the *Fol Act* and the community.

Table 1: Performance indicators

Performance indicator	1999/ 2000	2000/ 2001	2001/ 2002
Goal 1			
Proportion of cases overturned by the Supreme Court in judicial review proceedings	0	0	0
Number of cases resolved in the reporting year	352	393	316
Goal 2			
The proportion of cases resolved by informal methods	74%	86%	79%
Average time for finalisation of cases completed in the reporting year	53 weeks	23 weeks	31 weeks
Goal 3			
The time taken for the formal decision to be published on the website of the Information Commissioner	Within 7 days	Within 7 days	Within 7 days

A new goal introduced by David Bevan when he took over the role of Information Commissioner in 2002 was to achieve a more client-orientated organisation. To measure the success of this goal a client survey was carried out. Overall, the results were positive, the only dissatisfaction being the time taken to finalise the reviews. The survey will be repeated on an annual basis.

This article is based on findings from Annual Reports for the periods 1 July 1999 to 30 June 2000,² 1 July 2000

to 30 June 2001³ and 1 July 2001 to 30 June 2002⁴ (see Table 2).

Table 2: Summary of the Queensland Information Commissioners Annual Reports

Feature	1999/2000	2000/2001	2001/2002
Number of new review applications	327	376	275
Number of review applications completed	352	393	316
Number of review applications pending	182	165	124
Number of reviews resolved formally	92	56	67
Number of reviews resolved informally	223	289	217
Number of reviews where there was no jurisdiction	37	48	32
Most frequent category of user	Individuals seeking information about how a proposed government decision or policy would affect them	Public servants	Public servants
Agency whose decisions most frequently up for review	Department of Corrective Services	Department of Corrective Services and the Princess Alexandra Hospital	Queensland Police Service
Most frequently cited reason for review	Refusal to grant access to documents	Refusal to grant access to documents	Refusal to grant access to documents

Time taken for reviews

The average time taken for reviews to be finalised has remained relatively high throughout the reporting periods, and it is a matter that the Information Commissioner continually sets as a priority for resolving each new reporting year. Delays are largely due to a backlog of cases that accumulated during the initial years of the office when staffing and resource levels did not match the demand for external review. These issues have now been addressed and the backlog is slowly being reduced each year. However, record levels of applications were received in the 1999/2000 and 2000/2001 reporting years so the resolution of the backlog was slower than predicted by the Information Commissioner. It may be

necessary for extra resources be temporarily allocated to resolving this backlog as promptness of review is essential for public confidence in the system.

Number of review applicants

The number of new applications for review dropped in the 2001/2002 reporting year from 327 and 376 in the previous two years, to 275 in this reporting period. The Information Commissioner explained that the significant drop might be due to a return to the more gradual increases experienced up until the 1998/1999 reporting years. However, it was also speculated that this drop in new applicants could be connected to the introduction of legislative amendments to the *FoI Act* that saw both the introduction of charges and the ability for agencies to refuse applications that were voluminous. Clearly further investigation of the ramifications of the legislative amendments on *FoI* reviews will be required if the 2002/2003 report reveals the decrease in the number of applicants to be an emerging trend.

Type of applications

Over the reporting periods, the Queensland Police Service, Department of Corrective Services and Queensland Health and its various Health Service Districts were the agencies that had the vast majority of applications for external review lodged against them. This can largely be explained by the fact that these agencies receive a large number of *FoI* applications on an annual basis. This indicates that these agencies may need to look at developing and implementing strategies to make the release of information more systematic.

Reasons for external review

Predictably in all three of the annual reports, the majority of applicants sought to challenge an agency's decision to refuse access to the documents requested. Notably in the 2000/2001 report there was a significant increase in the number of applications for external review as a result of deemed refusals, with 119 cases in that year compared to only 63 in 1999/2000 and 54 in 2001/2002. Deemed refusal is where an agency fails to deal with a *FoI* application in the time proscribed by the *FoI Act*. This increase was attributed to one applicant making 30 deemed refusal applications in respect of the Princess Alexandra Health Service District and a prisoner applicant making 41 deemed refusal applications in respect of the Department of Corrective Services. While these agencies were unable to process the applications in the prescribed time, the problem had been addressed by the time of the 2001/2002 report.

Nature of users

The profile of the applicants seeking external reviews over the period of the annual reports consists largely of individuals seeking access to documents of personal interest or concern. The largest single category of applicants for review was public servants or former public servants in the 2000/2001 and 2001/2002 reports, with individuals seeking information about how a proposed government decision or policy would affect them

comprising the largest proportion of applicants in the 1999/2000 report. It is encouraging that citizens are exercising their rights to seek an external review in relation to Fol. This indicates that education campaigns undertaken by the Information Commissioner have achieved some community awareness about the existence and role of his office.

New legislative amendments

In November 2001, a new fee regime was imposed for the time spent processing Fol applications relating to those documents not concerning the applicant's personal affairs.

The effect that this charge will have on the number of Fol applications cannot be adequately determined until the 2002/2003 report is released. Application fees may act as a deterrent for potential Fol users and hence fewer Fol applications may be received. Whether this would have any influence on the number of reviews sought from the Information Commissioner is unclear, since while fewer initial Fol applications may mean fewer reviews being sought, alternatively the introduction of charges may see an increase in the number of external review applications with applicants seeking to challenge the amount charged or whether it was appropriate.⁵

A further legislative amendment was an extension of the agencies' scope to refuse an Fol application on the grounds that resources would be considerably and unreasonably redirected. The Information Commissioner did not observe any increase in the number of external reviews sought as a result of agencies refusing applications on this ground. However, the 2002/2003 report should reveal any increase in the rate at which agencies invoke this provision.

Suggested reforms

Both the Information Commissioner and LCARC report proposed that there is a need for an independent Fol monitor that could monitor agency compliance while also

promoting and providing assistance to members of the community with regard to the *Fol Act*.⁶ At present the Office of Information Commissioner has no statutory requirement to fulfil these roles and while they do attempt to provide some agency and community education, it is the Information Commissioner's belief that the primary role remains to be an external reviewer.

The Information Commissioner has continually called for the amendment of ss.36 and 37 of the *Fol Act* which exempt Cabinet matter and Executive Council matter from Fol applications. At present the wide scope of these exemptions provides the opportunity for material that poses no threat to the confidentiality of Cabinet or the Executive Council to be withheld from the ambit of Fol. This was highlighted in the 2000/2001 report, where a review was sought after thousands of documents concerning the construction of the Goodwill Bridge in Brisbane were exempted under s.36(1) because they were submitted to a Cabinet sub-committee.

Conclusion

Adequate resourcing and high standard formal decision making has enabled Queensland's Office of Information Commissioner to enhance the operation of Fol in that state and promote public confidence in the external review process. The goals set by the Information Commissioner have meant that infrastructure is in place to allow external reviews to be resolved informally and efficiently in the majority of instances. The annual reports reveal that the Information Commissioner has consistently reduced the backlog of external reviews, while also managing to process record levels of new applications in the 1999-2001 reporting periods. The 2002/03 report will be eagerly awaited, since it should reveal the ramifications that the introduction of the legislative amendments have had on the operation of Fol in Queensland.

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